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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1979

No. 79-244

UNITED STATES OF AMERICA,

*Petitioner,*

v.

JOHN M. SALVUCCI, JR., ET AL,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIRST CIRCUIT

**BRIEF FOR THE RESPONDENT  
JOHN M. SALVUCCI, JR.**

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**ARGUMENT**

**THE "AUTOMATIC STANDING" RULE  
OF *JONES V. UNITED STATES* AFFORDS  
POSSESSORY INTERESTS THE PRO-  
TECTION OF THE FOURTH AMEND-  
MENT IN A WAY CONSONANT WITH  
THE EFFICACIOUS ADMINISTRATION  
OF JUSTICE AND HENCE SHOULD NOT  
BE OVERTURNED.**

**A. The "Automatic Standing" Rule Was First Enunciated In *Jones v. United States*.**

The principle that a defendant automatically has "standing" under the Fourteenth Amendment to move to exclude from evidence an item that was seized during an assertedly illegal search where possession of the item by the defendant at the time of the search constitutes an essential element of the offense charged was first formulated in *Jones v. United States*, 362 U.S. 257 (1960). The defendant in *Jones* was charged with having "purchased, sold, dispensed and distributed" narcotics in violation of the federal statutes which require that narcotics be in or from the "original stamped package" and with having "facilitated the concealment and sale of" the same narcotics, knowing them to have been illegally imported into the United States. *Jones v. United States*, *supra*. at 258. Both statutory provisions under which *Jones* was prosecuted would have permitted conviction upon proof of the defendant's possession of narcotics, and in the case of the first charge, of the absence of the appropriate stamps (362 U.S. at 258). Thus, "possession was the basis of the government's case against [the defendants]." (322 U.S. at 258).

The Court in *Jones* assessed the purpose of the Fourth Amendment as follows: "The restrictions upon searches and seizures were obviously designed for protection against official invasion of privacy and the security of property." (362 U.S. at 261). The standing to assert a Fourth Amendment claim, the Court in *Jones* said, is contingent upon the defendant establishing that he or she, "must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a

consequence of a search or seizure directed at someone else. Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy" (362 U.S. at 261). The Court concluded that in the limited *Jones*-type situation, where possession by the defendant of a seized item would both confer standing and entail conviction, any necessity for a preliminary showing of an interest in the premises searched or the property seized was eliminated. Justice Frankfurter, writing for a unanimous Court in *Jones*, justified the "automatic standing" rule upon an examination of the Fourth Amendment and the inherent possessory interest in the *Jones* indictment.

The Court expressed the concern that the defendant should not be placed in the "dilemma" (362 U.S. at 263) of having to testify against him or herself in the context of a criminal charge of possession:

To establish "standing," Courts of Appeals have generally required that the movant claim either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched. Since narcotics charges like those in the present indictment may be established through proof solely of possession of narcotics, a defendant seeking to comply with what has been the conventional standing requirement has been forced to allege facts the proof of which would tend, if indeed not be sufficient, to convict him. At the least, such a defendant has been placed in the criminally tendentious position of explaining his possession of the premises. He has been faced, not only with the chance that the allegations made on the motion to suppress may be used against him at the trial, although that they may be by no means an inevitable



holding, but also with the encouragement that he perjure himself if he seeks to establish "standing" while maintaining a defense to the charge of possession. [362 U.S. at 261-262.]

The Court also declared that to apply the "standing" doctrine in cases like Jones would allow the injustice of an internally inconsistent conviction, a social concern that Rule 41(e) should protect against:

[T]o hold that petitioner's failure to acknowledge interest in the narcotics or the premises prevented his attack upon the search, would be to permit the Government to have the advantage of contradictory positions as a basis for conviction. Petitioner's conviction flows from his possession of the narcotics at the time of the search. Yet the fruits of that search, upon which the conviction depends, were admitted into evidence on the ground that petitioner did not have possession of the narcotics at that time. The prosecution here thus subjected the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation. It is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government. [362 U.S. at 263-264].

The Government's argument to the contrary essentially invokes *elegantia juris* \* \* \* As codified, the rule [41e] is not a rigid one, for under Rule 41(e) "the court in its discretion may entertain the motion [to suppress] at the trial or hearing." This qualification proves that we are dealing with carrying out an important social policy and not a narrow, finicky procedural requirement. This underlying policy likewise precludes application of the Rule so as to compel the injustice of an internally inconsistent conviction.

The doctrine of "automatic standing" was thus designed

to avoid the prosecutorial self-contradiction of indicting for possession at the time of the search, while denying that the defendant's possessory interest constitutes, "a person aggrieved by an unlawful search and seizure." The dilemma is all the more grievous when, in order to assert his or her suppression claim, the defendant would need to give testimony that the government could use at trial to aid in the proof of the defendant's guilt.

The Court has not overturned the Jones "automatic standing" rule during the last twenty years. *Brown v. United States*, 411 U.S. 223, 228 (1973); *Rakas v. Illinois*, 439 U.S. 128, 135 (1978). The present case squarely confronts the viability of the Jones holding. The rule should be affirmed in this case. For to abolish the "automatic standing" rule of Jones would unnecessarily jeopardize the fair administration of justice vis-a-vis defendants whose Fourth Amendment rights are implicated by the criminal possessory charge.

#### **B. Assertion Of A Possessory Interest In A Seized Item Gives A Defendant Standing Under The Fourth Amendment.**

The core underpinning of the Jones decision is that possession for purposes of criminal conviction at the time of seizure is the same type of possession required to establish standing under the Fourth Amendment (362 U.S. at 261). An examination of the Fourth Amendment's language, and purpose, and interpretive case law demonstrates that a possessory interest in a seized item constitutes a sufficient personal interest to warrant standing.

The Fourth Amendment recognizes, "The right of the people to be secure in their persons, houses, papers, and

effects, against unreasonable searches and seizures." Indeed, by its language property interests are protected by the Fourth Amendment. Early case law required an actual infringement on defendant's property interests to trigger Fourth Amendment protections. See, e.g. *Olmstead v. United States*, 277 U.S. 438 (1928); *Berger v. New York*, 388 U.S. 41 (1967); *Lanzo v. New York*, 370 U.S. 139 (1962); *United States v. Jeffers*, 342 U.S. 48 (1951). While the Court in *Jones v. United States* recognized that the Fourth Amendment protects property interests in the object of the search, it also expanded Fourth Amendment standing by defining injury to include both invasions of privacy and property interests [362 U.S. at 261].<sup>1</sup> *Jones* recognized the artificiality of a strict limitation to property interests and held that anyone, "legitimately on the premises" had a sufficient interest of privacy in that premises, the invasion of which is a sufficient injury to give rise to standing to object to a search of the premises. The Court did not, however, eliminate the older concepts which allowed standing based on violations of property rights. The progeny of *Jones* have consistently recognized that a violation of a defendant's possessory interests in a seized item constitutes a personal grievance protected by the Fourth Amendment.

In *Simmons v. United States*, 390 U.S. 377 (1968), holding that defendant's testimony given in an attempt to establish standing could not be admitted against him at trial, the Court noted in passing that, "the most natural way in which he [the defendant] could find standing to object to the admission of the suitcase" found on the premises of his accomplices' mother, "was to testify that he was its owner."

<sup>1</sup>This interest had been recognized earlier in *Boyd v. United States*, 116 U.S. 616 (1886), but had not been interpreted to give rise to standing without a showing of a possessory or proprietary interest.

*Simmons v. United States*, *supra* at 391.

Similarly, in *Combs v. United States*, 408 U.S. 224 (1972), where the property sought to be suppressed had been stolen and was seized from the farm of defendant's father, and defendant neither lived there nor was present at the time of the search, the Court remanded for a standing determination, thereby implying that one could have a privacy interest in stolen goods sufficient to confer standing.

In *Brown v. United States*, 411 U.S. 223 (1973) a case in which defendants were denied standing to challenge the seizure of stolen goods from the store of a third party, the Court noted that, "the petitioners were afforded a full hearing on standing and failed to allege any legitimate interest of any kind in the premises searched or the merchandise seized." *Brown v. United States*, *supra* at 229. The Court had earlier emphasized the relevance of a possessory claim to the goods by stating: "Thus, petitioners in this case could have asserted, at the pretrial suppression hearing, a possessory interest in the [stolen] goods at Knuckle's Store without any danger of incriminating themselves." *Brown v. United States* at 228.

Fourth Amendment standing through possessory interest in the seized item was analogously noted in *Alderman v. United States*, 394 U.S. 165 (1969) which focused on the standing requirements to challenge evidence which grew out of illegally overheard conversations. The Court stated the requirements for a Fourth Amendment violation as follows: "Such violation would occur if the United States unlawfully overheard conversations of a petitioner himself or conversations occurring on his premises, whether or not he was present or participated in those conversations." *Alderman v. United States*, *supra* at 176. Thus, by establishing that conversations are one's own there is standing.<sup>2</sup>

<sup>2</sup>The Court in *Rakas v. Illinois*, 439 U.S. 128 (1978), while not addressing the right of standing based solely on possession of the item seized, did note that the defendants had not asserted ownership of the rifle or shells seized.



The Fourth Amendment has recognized standing based on possessory interests due to the fundamental policy of protecting against arbitrary government invasions of person's property and privacy. *Jones v. United States*, 362 U.S. at 261. A person at common law had certain remedies to combat arbitrary searches and seizures. If an individual was arrested without proper justification, he or she had a valid cause of action for false imprisonment.<sup>a</sup> For a breach of the security of his or her home, an action in trespass was available.<sup>b</sup> For improper seizure of his goods, an action of replevin or conversion provided relief.<sup>c</sup> The Fourth Amendment protections should be guided at a minimum by common law property rights because a goal of the Fourth Amendment was to provide the citizen with at least the same protections against the government which were potentially present against other citizens for violations of one's property rights. See Knox, *Some Thoughts on the Scope of the Fourth Amendment and Standing To Challenge Searches and Seizures*, 40 Mo. L. Rev. 1 (1975). Furthermore, the expanded concept of invasion of privacy should not exclude property interests but should encompass the expectation that one's property will not be arbitrarily violated by the government.

The definition of an interest in property should not turn on actual possession at the time of the seizure. Although actual possession is crucial to the Fifth Amendment issue of whether one is forced to incriminate himself or herself by their own conduct (personally surrendering incriminating evidence), the right to assert control or ownership should be

<sup>a</sup>Entick v. Carrington, 95 Eng. Rep. 807 (K.B. 1765).

<sup>b</sup>Huckle v. Money, 95 Eng. Rep. 768 (K.B. 1763).

<sup>c</sup>See E. Wells, *Replevin* (2d ed. 1907).

the touchstone in analysing Fourth Amendment rights. The right to protection from a search of one's home even when the person was not present in the home was recognized in *Brown v. United States*, *supra*. Thus, it is not the presence of the defendant's body which is required to confer a privacy or property right. Likewise, goods placed with a third person, constitutes a property and privacy interest that those goods will be protected from intrusion by others.<sup>3</sup> The Fourth Amendment expressly provides for protection of one's possessions. An assertion of "possession," regardless of the location of the goods, should trigger a Fourth Amendment claim.

For purposes of Fourth Amendment claims, it should also not matter whether the items seized from the defendant were stolen goods. Property rights are not dependent on the legitimacy of the possession except with respect to people with a better right of possession.<sup>4</sup> Moreover, there is the policy consideration that the Fourth Amendment would provide little protection to property rights if the government can, after the fact, get around the amendment by showing the defendant's interests were not legitimate. The Court should be particularly sensitive to this policy argument in the context of possessory crimes where the wrongfully seized item would serve to convict the defendant. An assertion of possessory control in a seized good should confer standing

<sup>3</sup>If the goods were left with the intent of abandonment then arguably there remains no possessory interest. The automatic standing rule is, however, only limited to possessory crimes where the goods were "possessed" at the time of the seizure. Abandoned goods would also not constitute "possession" for criminal purposes. See *Parman v. United States*, 399 F.2d 559 (D.C. Cir. 1968); *United States v. Bozza*, 365 F.2d 206 (2nd Cir. 1966).

<sup>4</sup>This is the doctrine of *Jus Tertii*, which is applicable even to the government. See, *Knox, supra*, at p. 26, fn. 179.



under the Fourth Amendment without an analysis of the defendant's legitimacy to ownership.

The government's attempt to prove possession in the present case is an admission of the defendant's possessory interest. The interference with a possessory interest is a seizure and the defendant should have standing to challenge that seizure.<sup>5</sup> In the present case, where the police knew in advance that they were looking for stolen mail in the searched house, they should be held as unable to justify their failure to have obtained a proper warrant before the seizure. See *Coolidge v. New Hampshire*, 403 U.S. 443, 464-472 (1971).

In the limited fact situations of Jones-type cases, in which the item seized would provide the basis of conviction, the Court should also recognize the Fourth Amendment's purpose as encompassing defendant's right to challenge both the search and seizure.<sup>6</sup> The Amendment was clearly intended to protect both property and some privacy interests against arbitrary and unreasonable infringement by the

<sup>5</sup>*United States v. Lisk*, 522 F.2d 228 (7th Cir. 1975) recognized the right to challenge the seizure of an item in which the defendant had a possessory claim.

<sup>6</sup>The facts in our case, even assuming the lack of standing to challenge the police presence on the premises, nonetheless encompassed both an actual search and seizure. The allegedly stolen mail seized by the police according to the description in the "return of officer serving search warrant" statement was contained in a cardboard box, paper bag or various white envelopes. The incriminating evidence, was thus apparently contained in unmarked containers. Since the stolen mail was not in plain view it was the search of the containers which led to the discovery of the stolen mail. A person should have a right of expectation that the police will not search a closed container, even containing contraband, unless in possession of an appropriate warrant. *United States v. Chadwick*, 433 U.S. 1 (1977). Thus, the search of the containers themselves should ultimately give the present defendant standing to challenge the search and seizure of the allegedly stolen mail.

federal government. In construing the Fourth Amendment it is essential to determine the scope of government intrusion in order to define the injury to the defendant. The ability to illegally search homes and illegally seize items with impunity is an end to which the Court must be very sensitive. Recognizing the right of a defendant in a Jones-type situation to challenge an illegal search where there is possessory interest in the items seized does not expand Fourth Amendment protections, but maintains the protections provided by Jones. An interest in the seizure should trigger an interest in the entire process of the seizure because of the great impact of allowing illegally acquired evidence which is the basis of a conviction. Deterrence of illegal police searches is all the more crucial in the context of seizure of essential evidence; a deterrent aim inextricably woven into the Fourth Amendment.

Upon recognition that a possessory interest in a seized item triggers protection under the Fourth Amendment, the only remaining issue is the methodology of establishing that possessory interest. An examination of the Jones-type indictment, the nature of the crime charged, the flexibility of F.R. 41(e) and the drawbacks to a defendant in testifying at a suppression hearing each contribute to the sound policy of granting automatic standing.

**C. Since Implicit In The "Automatic Standing" Situation Is A Possessory Interest In The Item Seized, A Waiver Of A Suppression Hearing Is Permissible And Best Serves The Administration Of Justice.**

An indictment charging possession creates the inference of possession for standing purposes. The Appeals Courts

have recognized that the possessory interests do not always need to be established by defendant's testimony, but may be established through other evidence including: inferences from indictments; statements in affidavits in support of the search warrant and testimony of witnesses at the suppression hearing. See *Spinnelli v. United States*, 382 F.2d 871, 879 (8th Cir. 1967); *United States v. Williams*, 536 F.2d 810, 813 (9th Cir. 1976). Indeed, an indictment itself constitutes prima facie evidence of probable cause of the elements charged. *Beavers v. Henkel*, 194 U.S. 73 (1903). Justice Frankfurter highlighted the inference warranted from the indictment itself when he wrote, "In cases where the indictment itself charges possession, the defendant in a very real sense is revealed as a 'person aggrieved by an unlawful search and seizure.'" *Jones v. United States*, *supra* at 264.

The fair administration of justice is also a motivation for sustaining the automatic standing rule. *Jones v. United States*, *supra* at 262-263. "It is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the government." *Jones v. United States*, *supra* at 263-264. The Court's reasoning was rooted in the conviction that there is Fourth Amendment standing upon establishing possession in seized goods at the time of the search and seizure. Upon this conception of the Fourth Amendment the only question which remained was the methodology in exercising one's Fourth Amendment rights. The Court in *Jones* determined that the procedure for asserting a violation of the Fourth Amendment was flexible.

Rule 41(e), the Court held, is a flexible procedural requirement designed to serve an important social policy. *Jones v. United States*, *supra* at . Consequently, the Court could waive the formality of a suppression hearing. A

suppression hearing would manifest but form over substance when the prosecutor's indictment inherently contains the grounds for a defendant's Fourth Amendment standing. The formality of a hearing is all the more troublesome due to the prosecution's gains by the requirement of a suppression hearing.

The Court in *Jones* was concerned with the dilemma of a defendant who was required to self-incriminate himself or herself in order to assert Fourth Amendment rights. The problem of self-incrimination was alleviated by the holding in *Simmons v. United States*, 390 U.S. 377, 389-394 (1968) that a prosecutor may not directly use against a defendant at trial any testimony given by the defendant at a pretrial hearing to establish standing to move to suppress evidence. See *Brown v. United States*, *supra* at 228. A suppression hearing, nonetheless, would force a defendant to provide the prosecutor with information which could be used indirectly against the defendant. An alert prosecutor may well elicit from defendants testifying at a suppression hearing small bits of information from which the prosecutor may well develop the basis for additional investigation calculated to make the State's case stronger. See *Duncan v. State*, 276 Md. 715, 351 A.2d 144 (1976). On the basis of evidence garnered at a suppression hearing, the prosecutor could corroborate or alter his or her anticipated trial strategy. A suppression hearing would also give the prosecution considerable power to develop a record of incriminating admissions which would make it impossible for the defendant to give any relevant testimony at trial. In sum, the protection afforded a *Jones*-type defendant by *Simmons*, *supra* is illusory.

The present defendant, charged with unlawful possession of stolen mail, in violation of 18 U.S.C. 1708, was indicted

for possession at the time of the search which is the basis for the motion to suppress. To require the defendant to testify at a suppression hearing would surely have a "chilling effect" on the exercise of Fourth Amendment rights due to the potential indirect losses that the defendant faces by testifying as to his possessory interests in the items or places directly tied to the indictment of possession.<sup>7</sup>

The Court is not confronted in this case with the question of whether to expand Fourth Amendment protections. The issue is whether to continue to respect the dilemma, be it indirect or direct, of a defendant charged with a possessory crime to have to testify and thus aid the prosecutor in order to keep out illegally seized evidence. Since harm would come to a defendant by eliminating the "automatic standing" rule the Court should refrain from redrawing the presently accepted criteria for standing. There is also prosecutorial contradiction in seeking to convict for possession and yet deny standing on a motion to suppress an essential element of the crime. The fair administration of justice warrants "automatic standing" when the possession interest is established through the indictment for possession.

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<sup>7</sup>If the Court should determine that the "automatic standing" rule should be abolished, this case should be remanded for a hearing on the defendant's possessory rights in the premises searched and the items seized. *Combs v. United States, supra* and *Alderman v. United States, supra*. A remand is only appropriate because the defendant's possessory interests were not an issue in the Courts below because of the recognition of their automatic standing.

## CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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